IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 187

THE EVERGREENS,
Petitioner,
v.
COMMISSIONER OF INTERNAL REVENUE.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

REPLY BRIEF FOR PETITIONER

JOHN H. JACKSON,
Attorney for Petitioner.

VALENTINE B. HAVENS,
Of Counsel.

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The respondent does not attempt to defend the decision below, but argues that even though the value of $1.55 a square foot for improved lots be taken as *res judicata* for all purposes, the same tax liability might conceivably have been found by deciding that the cost of full improvement does not measure the difference in value between fully improved and partly improved lots. The whole tenor of the opinion of the Circuit Court of Appeals, however, makes it manifest that that court made the contrary decision, and that the case in fact turned upon whether the Tax Court was right when it "*altogether disregarded* the basis of the fully improved lots" (Opinion of HAND, *C. J.*).

Respondent's statement (Brief, p. 9) that the question is whether acceptance of $1.55 a square foot as the value of the improved lots

> "necessarily bound the Board to a particular method of determining the value of unimproved lots, namely, subtraction of the cost of improvement from the value of improved lots"

discloses a fundamental misconception. No such contention is made, and it is not suggested by the taxpayer that the principle of *res judicata* is to be applied with respect to any "method of determining the value of improved lots." The taxpayer asks only that effect be given to an adjudication of fact in a prior litigation. Whether that adjudication completely determines the issue in the instant case has nothing to do, under the authorities, with its binding effect so far as it goes. What consequences it leads to is a matter of reasoning, not a matter of law; and as a matter of reasoning, even if "subtraction of the cost of improvement from the value of improved lots" were an unsound method of valuation, it would not follow that the value of the improved lots was wholly without relevancy. For example, the Treasury's real estate experts could not have maintained their valuations of the partly improved lots if they had accepted the hypothesis that the value of the fully improved lots was $1.55 a square foot; *i. e.*, even if the prior adjudication does not completely prove the taxpayer's contention that the value of the unimproved lot was $1.35 a square foot, it completely disproves the Treasury's contention that the value was only 35 cents.

The same misconception appears on page 2 of respondent's brief, where the question presented is stated as follows:

> "In making such valuation was the Board bound, as petitioner contends, to accept the prior valuation of the improved lots as the necessary premise of its com-

putation, and deduct therefrom the cost of improvements?''

Petitioner's position is that the Board was bound by the rule of *res judicata* to accept the prior valuation of the improved lots as the necessary premise of its computation. Whether, to determine the value of the unimproved lots, we should ''take therefrom the cost of improvement'' is a distinct question with respect to which the petitioner need not depend upon the rule of *res judicata.*

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